

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
KOOTENAI RIVER BASIN (76D)
PRELIMINARY DECREE

* * * * *

CLAIMANT: Tooley Creek Ranch Inc.

CASE 76D-0022-R-2022
76D 215023-00
76D 212578-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Water Right Claims 76D 212578-00 and 76D 215023-00 appeared in the Preliminary Decree for the Kootenai River Basin (Basin 76D) issued May 6, 2021. These claims received issue remarks. Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination or by Water Court order.

Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. These claims received an objection from the United States of America (USDA Forest Service).

The Court consolidated these claims into Water Court Case 76D-0022-R-2022 on August 10, 2022. The United States withdrew its objections October 3, 2022. The Court then set a filing deadline for issue remark resolution. The Court did not receive a response.

FINDINGS OF FACT

1. Claim 76D 212578-00 appeared with the following issue remarks:

THIS CLAIM WAS NOT INCLUDED IN THE BASIN 76D
TEMPORARY PRELIMINARY DECREE ISSUED 03/22/1984.

CLAIM FILED LATE 07/07/88. IN ADDITION TO BEING
SUBORDINATE TO ALL INDIAN AND FEDERAL RESERVED
WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED
ON STATE LAW, THIS RIGHT MAY ALSO BE SUBORDINATE TO
CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE
SECTION 85-2-221 MCA.

THE LINCOLN COUNTY WATER RESOURCES SURVEY (1965)
APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

USDA AERIAL PHOTOGRAPH NO. 379-40 , DATED 08/10/1979
APPEARS TO INDICATE 47.0 ACRES IRRIGATED. A DESCRIPTION
OF THESE ACRES IS IN THE CLAIM FILE.

IT IS UNCLEAR HOW WATER IS CONVEYED FROM YOUNG
CREEK TO TOOLEY LAKE AND TO THE PLACE OF USE. POINT OF
DIVERSION AND CONVEYANCE CANNOT BE CONFIRMED FROM
INFORMATION IN THE CLAIM FILE OR AVAILABLE DATA
SOURCES.

2. Claim 76D 215023-00 appeared with the following issue remarks:

CLAIM WAS NOT INCLUDED IN THE BASIN 76D TEMPORARY
PRELIMINARY DECREE ISSUED 03/22/1984.

CLAIM FILED LATE 04/11/96. IN ADDITION TO BEING
SUBORDINATE TO ALL INDIAN AND FEDERAL RESERVED
WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED
ON STATE LAW, THIS RIGHT MAY ALSO BE SUBORDINATE TO

CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221 MCA.

EXISTENCE OF THE CLAIMED RESERVOIR CANNOT BE CONFIRMED WITH AVAILABLE DATA.

CLAIMED VOLUME EXCEEDS CAPACITY OF RESERVOIR PLUS EVAPORATIVE LOSSES. THE CLAIMED VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE VOLUME WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

3. Upon review of the file of each claim, these appear to be claims for multiple uses of the same right. Both claim the same priority date of August 2, 1924. Both use a Notice of Appropriation filed by Roy A. Truman on August 21, 1924 as their basis. That Notice states water from Young Creek was used for “domestic, power, fish pond[,] irrigation and other useful and beneficial purposes.” The Notice states Mr. Truman appropriated 10 cubic feet per second (cfs). The collective flow rate of these claims is less than 10 cfs. Both claims also claim the same point of diversion. It seems likely these claims share the same means of diversion.

4. The means of diversion for Claim 76D 215023-00 is a pipeline.

5. The means of diversion for Claim 76D 212578-00 should be described as “pipeline.”

6. The following remark should be added to both above-captioned claims:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES. 212578-00
215023-00

7. The issue remarks regarding irrigated acres on Claim 76D 212578-00 are conflicting.

8. The issue remarks on the above-captioned claims should be removed.

APPLICABLE LAW

1. A properly filed statement of claim is prima facie proof of its content. Section 85-2-227, MCA. The prima facie status of a claim may be overcome by a preponderance of the evidence. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

2. The Water Court must weigh an issue remark, and the information resulting in that issue remark, against the claimed water right. Section 85-2-247(2), MCA.

3. The Water Court must resolve all issue remarks not resolved through the objection process. Section 85-2-248, MCA. The Court must review information in the claim file or obtained by the Court to determine if there is a sufficient basis to resolve the remarks. 85-2-248(3), MCA.

CONCLUSIONS OF LAW

1. The changes described in the Findings of Fact may be made because the evidence in the record overcomes the prima facie status of claim 76D 212578-00 by a preponderance of the evidence and because the evidence sufficiently demonstrates the above-captioned claims are for multiple uses of the same right.

2. The evidence in the record and the proposed changes provide the Court with a sufficient basis to resolve and remove each issue remark from each above-captioned claim. Additionally, the acres irrigated issue remarks on Claim 76D 212578-00 do not overcome the prima facie status of the claim.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. Post-decree Abstracts of Water Right Claims are served with this Report to confirm the recommended changes have been made in the state’s centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 212578-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners: TOOLEY CREEK RANCH INC
751 TOOLEY LAKE ROAD
REXFORD, MT 59930 9797

Priority Date: AUGUST 2, 1924

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 07/07/88 . AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 420.00 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 46.00

Source Name: YOUNG CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SEWNNE	23	37N	28W	LINCOLN

Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: PIPELINE

Period of Use: APRIL 15 TO OCTOBER 15

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	7.00		W2SESE	23	37N	28W	LINCOLN
2	28.00		SWSE	23	37N	28W	LINCOLN
3	11.00		E2NWNE	26	37N	28W	LINCOLN
Total:	46.00						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

34215-00 34216-00 212578-00

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE ASSOCIATED WHICH MEANS THE RIGHTS SHARE THE SAME PLACE OF USE.

12021-00 34215-00 34216-00 68717-00 212578-00

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

212578-00 215023-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 215023-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners: TOOLEY CREEK RANCH INC
751 TOOLEY LAKE ROAD
REXFORD, MT 59930 9797

Priority Date: AUGUST 2, 1924

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 04/11/96 . AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

Type of Historical Right: FILED

Purpose (use): FISH AND WILDLIFE

Flow Rate: 150.00 GPM

Volume: 100.00 AC-FT

Source Name: YOUNG CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SEWNNE	23	37N	28W	LINCOLN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: PIPELINE

Reservoir: OFFSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NWSWSE	23	37N	28W	LINCOLN

Diversion to Reservoir: DIVERSION # 1

Depth: 14.00 FEET

Surface Area: 1.00 ACRES

Capacity: 7.00 ACRE-FEET

Reservoir: OFFSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NWSWSE	23	37N	28W	LINCOLN

Diversion to Reservoir: DIVERSION # 1

Depth: 14.00 FEET

Surface Area: 1.00 ACRES

Capacity: 7.00 ACRE-FEET

Reservoir: OFFSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NWSWSE	23	37N	28W	LINCOLN

Diversion to Reservoir: DIVERSION # 1

Depth: 14.00 FEET

Surface Area: 2.00 ACRES

Capacity: 14.00 ACRE-FEET

SEE THE RESERVOIR WORKSHEET IN THE CLAIM FILE FOR ADDITIONAL
RESERVOIR DATA.

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NWSWSE	23	37N	28W	LINCOLN

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

212578-00 215023-00